IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1506 142

COLEMAN F. MADDEN,

Petitioner,

against

QUEENS COUNTY JOCKEY CLUB, INC.,

Respondent.

BRIEF OF WESTCHESTER RACING ASSOCIATION, THE SARATOGA ASSOCIATION, METROPOLITAN JOCKEY CLUB AND EMPIRE CITY RACING ASSOCIATION, AS AMICI CURIAE

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Attorneys for Amici Curiae.

SUBJECT INDEX

CASES CITED

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(Emphasis ours unless otherwise indicated.)

Preliminary Statement

This brief, in opposition to the Petition for Writ of Certiorari, is submitted by the above-named New York racing associations by consent of the parties to the case. These Associations heretofore have filed briefs herein, as *amici curiae*, in the New York Court of Appeals and in the Appellate Division, Second Judicial Department. (See 296 N. Y. 249; 269 App. Div. 644.) Their situations are similar to that of Respondent.

For reasons herein stated they regard it as important, in the interests of New York racing generally, that this application be denied and that the considered judgment of the highest Courts of the State be accepted as final in such a matter. The state courts are intimately familiar with the local laws and conditions and with the long historical background relating to racing and betting in that state.

Statement of the Case

Respondent is a private New York corporation which owns and operates a running race track at Aqueduct, N. Y. and conducts pari-mutuel betting thereat for its patrons, under licenses from New York State Racing Commission and under the Racing and Pari-Mutuel Laws of that State (R. 23-4).

Petitioner states he is in the business of tungsten mining. He describes himself as a "patron of the races" and of pari-mutuel betting; also, as a citizen of the United States and a resident and taxpayer of New York (R. 9, 23).

Petitioner brought suit seeking a judgment declaring that he "has a right and privilege of entering the race track at Aqueduct and attending the horse races and patronizing the pari-mutuel betting conducted thereon" and permanently enjoining respondent from preventing him "from exercising his said right and enjoying his said privilege" (R. 26-7).

On his complaint and affidavits he moved for temporary injunction (R. 6-7). Respondent cross-moved for dismissal of his complaint for legal insufficiency (R. 21). A Justice at Queens County Supreme Court Special Term granted petitioner's motion and denied the cross-motion with an opinion devoid of legal authorities (R. 4-6, 28-33). On respondent's appeal, the Appellate Division, Second Judicial Department unanimously reversed, with an opinion, denying petitioner's motion for a temporary injunction and granting respondent's cross-motion to dismiss the complaint (R. 39-40, 41-4). A judgment of reversal and dis-

missal was entered thereon (R. 37-8). On petitioner's appeal therefrom, the Court of Appeals unanimously affirmed the judgment of reversal and dismissal, with an opinion, and judgment was entered thereon (R. 47-61).

Petitioner's complaint, as amplified by his affidavits, is as significant in its omissions as in its inclusions. Petitioner does not claim that he was denied admission to respondent's race course on account of his race, color, creed or national origin. He does not allege any violation of his civil rights, set forth in the New York "Civil Rights Law." He does not claim that his right or ability to earn a living or to exercise his calling or occupation has been affected or denied by any act of respondent. So far as appears from his papers, attending horse races and betting thereon is to him, as it is considered generally, simply a matter of amusement. He does not allege that he purchased and presented any ticket of admission, or that he attempted to do so, or that he was barred or ejected after doing so. He says he was ordered to stay away from a race track in Florida in January 1944 and from the Belmont Race Track in June 1945. Then, in July 1945, he made an appointment, by telephone, to speak with the Pinkerton man at the Aqueduct track and, upon inquiry, was told by the Pinkerton man that he would not be admitted there. He alleges that on June 30, 1945 (apparently prior to said appointment) he lodged a complaint with the New York State Racing Commission which was denied on July 20, 1945 (R. 9-10; 24-5). He then started this action.

His complaint has been dismissed unanimously, by the two highest appellate courts of New York on the ground that under the common and statutory law of that state respondent racing association has a right to choose its patrons and to exclude persons from its grounds except for race, color, creed or national origin and that petitioner does not have a legal right to enter its grounds to attend its races or to bet thereon.

The pith of petitioner's complaint and petition is that he, as a member of the general public, has an unqualified

legal right or privilege, under New York statutes, to enter upon and to attend horse races on respondent's property in order to engage in pari-mutuel betting thereat and that such right or privilege is guaranteed to him by the "equal protection" clause of the Fourteenth Amendment of the Federal Constitution.

He seeks review by this Court to present this claimed federal constitutional right to bet on horse races on respondent's property.

POINT I

No reasons exist here for granting writ of certiorari.

Since review on writ of certiorari is purely discretionary, special and important reasons must be shown to justify its grant (U. S. Sup. Ct. Rule 38(5)). No such reasons are shown by petitioner or exist here.

The case does not, actually, involve any federal question of substance. The decision of the state court sought to be reviewed was grounded on applicable principles of state law and not on any federal question. Moreover the state court's decision does not conflict with any applicable decision of this Court (*Cf.*, *Marrone* v. *Washington Jockey Club*, 227 U. S. 633, where this Court held that even a ticket of admission to a race track was merely a license which properly could be revoked either by refusing admittance to the purchaser or by ejecting him. Also, *Cf.*, *Western Turf Association* v. *Greenberg*, 204 U. S. 359, where this Court held that the Fourteenth Amendment could not be invoked by a racing association to strike down a state statute regulating the terms of admission to places of amusement and entertainment since that was a proper exercise of police power).

New York has specific and detailed statutes governing such admissions, as well as racing and pari-mutuel betting, which have been construed by its highest court.

The question of petitioner's right or privilege, if any, to enter upon respondent's race track in order to make pari-mutuel bets on horse races being run there, seems clearly to be a matter of local state law and private rights and not a matter of general, public or federal significance or importance—calling for the intervention of this Court. Petitioner's various contentions have received extended, careful consideration by the two highest state appellate courts.

POINT II

Questions of New York State law are controlling in this case and the decision of that State's highest court should be regarded as conclusive and not reviewable by this Court.

Where, as here, the local state law, statutory and common, is determinative of the case, the unanimous decision of the Court of Appeals of New York, expressly stating and construing that law, should ordinarily conclude the litigation. Particularly is that so, where, as here, the next highest appellate court of that State also unanimously reached a similar decision.

This court often has pointed out that the state court of last resort should have the final word on the construction and meaning of the statutes of that state and that its decision thereon should be accepted by this Court (*Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32; *Huddleston* v. *Dwyer,* 322 U. S. 232).

The New York courts have written full opinions stating the reasons why petitioner's complaint and contentions lack validity and expounding the statutory and common law of New York controlling the case. Among the determinative questions of law decided herein by said courts are the following:

(1) At common law a race course proprietor like proprietors of other kinds of amusement places, had the right to choose his patrons and to exclude other persons therefrom on his own volition.

(2) In New York the legislature has not changed or limited this common law right, except to the extent of prohibiting exclusion from race courses because of race, creed, color or national origin under the N. Y. Civil Rights Law.

(3) Although the business of conducting horse races and pari-mutuel betting at a private race track may be affected by a public interest to the extent of justifying regulation, licensing and taxation under the police power or for the purpose of revenue, it is in no sense public property or a public function or calling requiring admission of and service to all persons.

(4) A license to conduct horse racing or to conduct betting, under the Racing and Pari-Mutuel Laws of New York, is not a franchise and neither the license nor the exaction of a fee or tax for the license makes the licensee the administrative agent or official of the State.

(5) The enactment of the New York Pari-Mutuel Law did not change the essentially private character of the business and property of a race track proprietor or affect his right to select his patrons.

The opinions below cite the controlling authorities in support of each of these propositions, which need not be repeated here. We will mention but one.

As long ago as 1897 in *Grannan* v. *Westchester Racing Association*, 153 N. Y. 449 a "patron of the races," such as this petitioner claims to be, was refused admission to a New York race track though he had purchased and presented a ticket of admission and agreed to comply with all the rules and regulations. He brought suit against the racing association for an injunction. The Court of Appeals, in unanimously reversing the Appellate Division and affirming a Special Term order denying an injunction, held that "a person who frequented such races had only a *qualified* right to be present" (at p. 460). It specifically overruled and repudiated the theory, advanced by the Appellate Division, "that the racing association was a corporation organized for a public purpose, enjoyed a public franchise, and, therefore, the public had an interest which required the corpora-

tio
admit to its races all persons who applied for
als and paid the entrance fee charged". The Court
luruled plaintiff's contention that he had an "abso-
Ci" to attend the races, and after referring to the
189ts Act of 1895 (Equal Privileges Statute, Laws of
p. 1042) stated (p. 465):

> We think the purpose of the statute now under con-
> eration was to declare that no person should be
> prived of any of the advantages enumerated, upon
> ground of race, creed or color, and that its pro-
> ition was intended to apply to cases of that char-
> er, and to none other. It is plain that the legis-
> ure did not intend to confer upon every person all
> rights, advantages and privileges in places of
> usement or accommodation, which might be en-
> ed by another. Any discrimination not based
> on race, creed or color does not fall within the
> ndemnation of the statute."

Ndecision was approved in *Woollcott* v. *Shubert*, 217
of and other later cases and has represented the law
ork for half a century.
sain this case, petitioner is urging again the very
yory and contention first advanced by Grannan fifty
of which were unanimously repudiated by the Court
stls of that day. The Racing Law of today is sub-
ua re-enactment of the Percy-Gray Law of 1895
Yhich that case was decided. Since then the New
(il Rights Law, in respect of equal accommodations,
ti. 40) has been amended many times, including five
cl ce the adoption of the Pari-Mutuel Law, without
in (except to add "national origin") the rule stated
M *rannan Case*. Since the adoption of the Pari-
L aw, Section 40-b was added to the Civil Rights
n "race courses" purposely and significantly were
ded in it.
c lear enough, under the well settled statutory and
ci law of New York, as stated and construed by de-
c f its highest courts, that petitioner has no valid
cl t. Those decisions should be conclusive now, pre-
eview by this Court.

POINT III

The importance and necessity of the right of racing associations to select their patrons is manifested by the entire statutory plan in New York.

It is apparent from the whole statutory scheme in New York that the Legislature neither desired nor intended the general public to have an unqualified right to attend race courses and to bet.

The Racing Law (McKinney's Unconsolidated Laws, Title 21, Chap. 1, Secs. 7501-20) enacted in 1926 was substantially a re-enactment of the Percy-Gray Law of 1895. It provides for the incorporation of racing associations (Secs. 7501-5); the appointment of a State Racing Commission to supervise generally race meetings (Secs. 7506-7); the licensing annually of racing associations by that Commission (Sec. 7508); the revocation of such licenses for failure to comply with the law and the license terms and if not deemed "conducive to the interests of legitimate racing" (Sec. 7509); the licensing of all participants and employees at race meetings by the Jockey Club, under whose rules meetings are required to be run, in order to maintain "a proper control over race meetings" (Secs. 7508, 7512); the posting of notices upon race courses prohibiting disorderly conduct, post-selling, bookmaking, etc. (Sec. 7513); the appointment of special policemen to preserve order and prevent offenses and wrong conduct within and around the track property (Sec. 7514); the penalizing of racing for any bet or reward except as allowed, which is declared "a public nuisance" (Sec. 7515); and the taxing of admissions (Sec. 7517).

In 1940 the N. Y. State Constitution provision prohibiting laws allowing lotteries, post-selling, bookmaking or other kind of gambling was amended to exempt "parimutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government" (Art. I, Sec. 9).

No right to pari-mutuel betting itself was created by the Constitutional Amendment (*Application of Stewart,* 174 Misc. 902; aff'd 260 App. Div. 979; appeal denied 261 App. Div. 851).

Later in 1940 the Pari-Mutuel Revenue Law (McKinney's Unconsolidated Laws, Title 21, Chap. 2, Secs. 7561-7583) was passed, as *"supplemental"* to the Racing Law (Sec. 7561). It legalized pari-mutuel betting in New York "if conducted in the manner and subject to the conditions and supervision provided by this act", for the purpose of deriving from such betting a reasonable revenue for the support of government, and provided that "Such pari-mutuel betting shall only be conducted within the grounds or enclosure of a race track on races at such track and on such dates when racing at such track shall have been authorized pursuant to this act".

Throughout the statute it is apparent that it is designed for the *patrons* of licensed racing associations, rather than the public generally (*Cf.*, Secs. 7563, 7564, 7565, 7568, 7569).

By Section 7563 an association licensed to conduct a race course may be licensed by the State Racing Commission to conduct pari-mutuel betting "on the races to be run thereat", provided it appears that it "has facilities and equipment sufficient to accommodate *its probable number of patrons*".

By Section 7564 the racing association must post a bond to assure its paying the taxes imposed, distributing to the patrons all sums due on winning tickets and otherwise complying with all provisions of the Racing and Pari-Mutuel Laws.

By Section 7565 the racing association must provide within its grounds a place and all equipment and machines required for the conduct of the pari-mutuel system of betting *by its patrons.* Also, it must reimburse the state for the cost of providing supervisory functions at race meetings and of administering the rules (Sec. 7583).

By Section 7577 the license may be revoked if the racing association does not conduct racing at its tracks, including pari-mutuel betting thereat, according to the Racing and Pari-Mutuel Laws, the license and the rules or if its officers

or directorrs *knowingly permit* on its grounds or tracks bookmakingg or other illegal kinds of gambling.

Other ssections relative here provide for rules by the State Racing Commission regulating the conduct of the betting (Secc. 7566); for the payment by the association to the state off a percentage of the pari-mutuel pool deposits and breaks s "as a reasonable tax," which is thereby levied, for the prrivilege of conducting pari-mutuel betting at its track; and t that no licensee shall knowingly permit any minor to be a patrron of the betting (Sec. 7567).

Prior tto the Pari-Mutuel Law the state had attempted in many wways to prevent bookmaking at race tracks. Bookmaker and d professional gambler were outlawed (*Watts* v. *Malatesta*, 262 N. Y. 80; *Bamman* v. *Erickson*, 288 N. Y. 133; *Hofferman* v. *Simmons*, 290 N. Y. 449). The decisions of the courts recognized the difficulties inherent in detecting and convicting a bookmaker (*Cf.*, *People ex. rel. Lichtenstein* v. *Langan*, 196 N. Y. 260; *People* v. *Carpenito*, 292 N. Y. 498).

The Pari-Mutuel Law has attempted to eliminate the bookmaker and professional gambler. The betting is supervised and open and is mutuel, *i. e.*, between the patrons of the pools who establish the odds. It is conducted by and on the grounds of reputable racing associations who are already licensed to conduct races.

These licensed associations cannot be lax for fear of a revocation of their licenses. They must exercise care in selecting their patrons. For example they must, under the Rules of the State Racing Commission (Rule 30b), exclude or reject reputed bookmakers, vagrants, fugitives from justice and persons whose conduct is or has been improper, obnoxious, unbecoming or detrimental to the best interests of racing. Without the long recognized right to choose and exclude their patrons, they would be in constant jeopardy and fear of violating the law, the rules or its license and of being sued, by persons excluded or ejected, for slander, false arrest, etcetera and of being faced with difficulties of proof in this connection by admissible evidence. Since it is against the financial interest of such associations to exclude persons from the races and the betting, and since exclusions and

ejections produce expensive litigation, it may be assumed that the associations will exercise their rights sparingly.

In view of the great difficulty in many cases of obtaining competent legal proof of actual offences, the only practical solution of the difficulty is the continued recognition of the right to refuse admission without the obligation to state the reason therefor.

The New York Legislature, recognizing the problem and desiring to maintain the necessary controls, has clearly indicated its intention to continue the pre-existing right to exclude and not to give the general public an unqualified right to enter race tracks and bet at pari-mutuels. There is no intention, expressed or implied, in the Pari-Mutuel Law to change the existing law regarding admission of the public to race tracks.

As noted above, Section 40 of the Civil Rights Law has not been changed and still prohibits exclusion only for race, creed, color or national origin; and race tracks have been intentionally omitted from the scope of Section 40-b of that law.

The entire legislative and judicial history in New York in respect of the matter is contrary to the position and arguments urged by this petitioner herein and show a definite, purposeful intention to continue, with even more emphasis, the long recognized rule that a racing association, such as respondent, may select its patrons and exclude others and that a person, such as petitioner, has no legal or constitutional right to be admitted or to bet on its property.

In *Kotch* v. *Board of River Port Pilot Com'rs*, 91 U. S. (Law Ed.) 826, this court pointed out the limitations of the "equal protection" clause, and the necessity of considering the broad objectives and the historical evolution of the state laws and institutions in question in determining the applicability of the clause.

In light of such considerations, the inapplicability of the clause in this situation is perfectly obvious, as is the importance of not upsetting the statutory scheme as planned and construed.

POINT IV

The Equal Protection clause of the Fourteenth Amendment clearly is not applicable for various reasons.

The act of exclusion complained of by petitioner was that of a private corporation, not of the state or its official or agency. It is state action of a particular character that is prohibited. Individual invasion of individual rights, alleged or real, is not the subject matter of the Amendment (*Civil Rights Cases*, 109 U. S. 3, 11; *Snowden* v. *Hughes*, 321 U. S. 1). Racing associations in New York are private corporations (Racing Law, McKinney's Unconsolidated Laws, Sec. 7501 *et seq.*). They have not lost that character simply because the state licenses and supervises generally their activities of horse racing and pari-mutuel betting and taxes admissions and betting receipts, as the state appellate courts have held herein.

There is no claim that petitioner has been affected or interfered with in the exercise or pursuit of his occupation or calling. There is no claim by petitioner that horse racing and betting are anything but amusements so far as he is concerned. Admissions to places of amusement are governed by the New York common law and Civil Rights Law. He does not claim any violation of the Civil Rights Law, which prohibits discrimination at race courses only on account of race, color, creed or national origin (Secs. 40, 40-b).

In so far as petitioner's invocation of the Fourteenth Amendment is based on the assumptions that racing associations, under the New York statutes, are operating under a franchise and are monopolies, and are state agencies, it is enough to say that the highest state court has held, in construing these statutes, that such assumptions are entirely unfounded.

None of the decisions cited in Petitioner's brief, in support of his claim as to the applicability here of the "equal protection" clause, are relevant or analogous. They all involved much different facts and situations. Conscious

of this, he seeks to bend general language extracted from those decisions to meet his needs and to come within what he terms the "broad compass" of equal protection (Pet. Brief, p. 13).

The limitations of the equal protection clause have been pointed out by this court in many decisions, the latest of which is *Kotch* v. *Board of River Port Pilot Com'rs, supra.* We need not dwell on them. We think it is clear enough that its purpose is not to protect or aid a person in forcing his way into private property in order to bet thereat, against the desire of the proprietor and the considered judgment of the New York legislature and highest courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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